Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

NO. 81-131
OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

HERSCHEL H. FRIDAY, JR.
FRIDAY, ELDREDGE & CLARK
Twentieth Floor
First National Building
Little Rock, Arkansas 72201
(501) 376-2011

Counsel of Record for Appellants

OTHER COUNSEL FOR APPELLANTS

GEORGE PIKE, JR.
FRIDAY, ELDREDGE & CLARK
Twentieth Floor
First National Building
Little Rock, Arkansas 72201

DARRELL D. DOVER
HOUSE, HOLMES & JEWELL
1550 Tower Building
Little Rock, Arkansas 72201

C. J. GIROIR, JR. and
HILLARY RODHAM
ROSE, NASH, WILLIAMSON,
CARROLL, CLAY & GIROIR, P.A.
720 West Third Street
Little Rock, Arkansas 72201

TERRY MATTHEWS
WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201

JAMES M. McHANEY
OWENS, McHANEY & McHANEY
1902 First National Building
Little Rock, Arkansas 72201

JOHN B. PLEGGE
PLEGGE & WEBER
1004 Pyramid Life Building
Little Rock, Arkansas 72201

GRIFFIN SMITH
1955 Union National Bank
Little Rock, Arkansas 72201

ROBERT D. SMITH, III
SMITH & JERNIGAN
1000 Tower Building
Little Rock, Arkansas 72201

W. J. WALKER
601 Rock Street
Little Rock, Arkansas 72203

L...RY C. WALLACE
WALLACE, HILBURN, CLAYTON,
MAY & CALHOUN
Twin City Bank Building
North Little Rock, Arkansas 72114

STEPHEN A. WHITE
Post Office Box 85
Charleston, Arkansas 72933

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... Index

THE QUESTIONS ARE SUBSTANTIAL 1

A. INTRODUCTION..... 1

B. THE ARKANSAS USURY LAW DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES..... 2

C. THE ARKANSAS USURY LAW IS AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES..... 6

D. THE ARKANSAS USURY LAW DENIES APPELLANTS EQUAL PROTECTION OF THE LAW UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION..... 8

E. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

page

A. B. Small Company v. American Sugar Refining Company, 267 U.S. 233 (1925) 3
Aldens, Inc. v. Packel, 524 F.2d 38 (3rd Cir. 1975) 8
Alsup v. State, 178 Ark. 170, 10 S.W.2d 9 (1928) 3
Berger v. State Board of Hairdressing, 118 R.I. 55, 371 A.2d 1053 (1977) 3
Brotherhood of Locomotive Firemen and Enginemen v. Chicago R.I. & P.R. Co., 393 U.S. 129 (1958) 4
Cesary v. Second National Bank of North Miami, 369 So.2d 917 (Fla. 1979) 5
Culberson v. Ashford, 118 Tex. 491, 18 S.W.2d 585 (1929) 3
Ferguson v. Skrupa, 372 U.S. 722 (1966) 5
Gold v. Lorenzo, 425 F.2d 949 (2nd Cir. 1979) 3
Griffith v. Connecticut, 218 U.S. 563 (1910) 5
Karrick v. Cantrill, 277 F. 578 (Ct. App. D.C. 1922) 3
Kassel v. Consolidated Freightways Corporation of Delaware, ____U.S.____, 101 S.Ct. ____, 67 L.Ed. 580 (Decided March 24, 1981) 5
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 7
Minnesota v. Clover Leaf Creamery Co., ____U.S.____, 101 S.Ct. 715 (1981) 3
Mora v. Majas, 223 F.2d 814 (1st Cir. 1955) 6
Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) 6
Southern Pacific Company v. Arizona, 325 U.S. 761 (1945) 7
Sproles v. Binford, 286 U.S. 374 (1932) 5
State v. Spiegel, 623 P.2d 1147 (Wash. 1981) 5

United States v. L. Cohen Grocery Company, 255 U.S. 581 (1922) 3
Whitaker v. Spiegel, 623 P.2d 1147 (Wash. 1981) 5
Williams v. Illinois, 399 U.S. 235 (1970) 8

CONSTITUTIONAL PROVISIONS

1874 Constitution of Arkansas, Article 19, Section 13 1
The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution 2, 8
Commerce Clause of the United States Constitution, Article I, Section 8 (3) 6

IN THE

Supreme Court Of The United States

NO. 81-131

OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

THE QUESTIONS ARE SUBSTANTIAL

A.

INTRODUCTION

The motion to dismiss filed by the Attorney General draws into sharp focus the issue before this Court. Basically,

the Attorney General is taking the rather startling position that because a state may enact usury laws under its police power, that the manner and level of that price regulation is *not subject to judicial review and may be totally arbitrary and capricious!* Appellants continue to maintain, on the other hand, that even though a state may determine as a matter of public policy, not subject to judicial review, to have usury laws, when it does so, however, it must establish rates in a rational manner at rational levels, or the usury laws may be successfully challenged as being in violation of the United States Constitution.

B. THE ARKANSAS USURY LAW DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is no question but that Arkansas and other states may regulate their economy, including charges for the use of money, under their police power. The basic thrust of the Attorney General's motion to dismiss is to justify that a state may so regulate its economy. This argument misses the point. The question is whether a state may *irrationally, arbitrarily* regulate its economy by fixing prices for the use of money at a destructive, prohibitive level which has no rational connection with the purpose of the law, namely to present *excessive* charges for the use of money. The Arkansas law *forbids* borrowing and lending when the national market price for the use of money exceeds 10%.

The Attorney General makes the very erroneous statement that the cases relied upon by appellants concerned only the setting of public utility rates and the

establishment of minimum price schedules, rather than cases involving the setting of maximum prices in non-utility cases. (motion to dismiss, pages 6-8)

Contrary to this analysis of appellants' cases, in their jurisdictional statement appellants cited the following cases not involving railroad or public utilities in which courts struck the particular setting of a *maximum* rate or price as being arbitrary and unconstitutionally low: *United States v. L. Cohen Grocery Company*, 255 U.S. 581 (1922) (maximum price for sugar); *A.B. Small Company v. American Sugar Refining Company*, 267 U S. 233 (1925) (maximum price for sugar); *Gold v. Lorenzo*, 425 F.2d 949 (2nd Cir. 1979) (maximum rate for real estate brokers' fees); *Mora v. Majas*, 223 F.2d 814 (1st. Cir. 1955) (maximum price for rice); *Karrick v. Cantrill*, 277 F. 578 (Ct. App. D.C. 1922) (maximum residential rent rates); *Culberson v. Ashford*, 118 Tex. 491, 18 S.W.2d 585 (1929) (maximum agricultural rent rates); *Berger v. State Board of Hairdressing*, 118 R.I. 55, 371 A.2d 1053 (1977) (maximum fees for hairdressing school); *Alsup v. State*, 178 Ark. 170, 10 S.W.2d 9 (1928) (maximum rate for employment agency).

Moreover, the cases cited by appellants in their jurisdictional statement which did involve railroad and utility rates are precisely in point. As the Court stated *Gold v. Lorenzo*, 425 F.2d 949 (2nd Cir. 1979):

> Gold's attack on the level of the commission seems indistinguishable from claims by railroads and other public utilities that state administrative orders are depriving them of their property without due process of law (425 F.2d 949 at 961)

If there were any different considerations in such cases, those considerations would cause an even stricter

review of interest rate limitations. because a public utility is guaranteed a rate of return. A lender is *not* guaranteed a rate of return, and therefore should not be arbitrarily hampered in his *effort* to make a profit.

Moreover, unlike a public utility or railroad which *must* provide gas, electricity, water, and service to its customers, if a rate is set arbitrarily low against a lender, the borrower will not receive the use of the money at all. A lender cannot be forced to lend in a state with confiscatory usury laws. The adverse impact upon the customers is even the more reason why any price regulation for the use of money must be rational.

The cases cited by the Attorney General also fully support the position of appellants.

The only issue before the Court at the present time is whether the questions presented are substantial enough to warrant plenary consideration. The Attorney General cited case after case in which this Court considered questions only after plenary consideration, with opinions that detailed the many factors that must be considered.

Further, in each of the cases the Court did judicially review the reasonableness of the challenged regulation, where the reasonableness of that regulation was at issue. For example, in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1958) (motion, p. 8) it was only after a very detailed judicial review by this Court of the reasons given by the state to justify the Arkansas full crew law that the law was upheld. Like the present case, the Court pointed out that whether to have a full crew law or not is a matter of public policy, but once such a law is enacted, it will be judicially reviewed for reasonableness.

In none of the cases cited by the Attorney General was any issue raised, as in the present case, regarding the reasonableness of the rates set. In *Ferguson v. Skrupa*, 372 U.S. 722 (1966); *State v. Spiegel*, 277 N.W.2d 298 (S.D. 1979); and *Whitaker v. Spiegel*, 623 P.2d 1147 (Wash. 1981) (motion, pgs 8, 9) there was a challenge to the state's right to forbid debt adjusting except by lawyers and the state's right to have usury laws where interstate commerce is involved. The rates set by the debt adjusters and the rate set by the states for interest was not even questioned.

Likewise, in *Griffith v. Connecticut*, 218 U.S. 563 (1910) and *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979) there was no challenge to the level of interest rates set by the state. Rather, in each case, the challenge was to the classification scheme adopted by the legislature. By contrast with the Arkansas law which contains no classification and attempts to set a flat rate for all times, for all lenders, for all borrowers, for all types of loans, both of these cases support the position of appellants. Both cases demonstrate how legislatures can properly classify in an effort to rationally, rather than arbitrarily regulate interest rates.

Finally, the case of *Sproles v. Binford*, 286 U.S. 374 (1932), (motion, p. 9) upholding the validity of a state statute forbidding truck lengths over fifty-five feet has apparently been overruled by the decision of this Court in *Kassel v. Consolidated Freightways Corporation of Delaware*, ____ U.S. ____, 101 S.Ct. ____, 67 L.Ed. 850 (Decided March 24, 1981).

The Attorney General, then, has totally failed to overcome the showing made in apellants' jurisdictional statement that the due process question indeed is substantial and requires plenary consideration.

C. THE ARKANSAS USURY LAW IS AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

The Attorney General's arguments and cases cited under this heading of his brief likewise totally fail to overcome appellants' position that the question is so substantial as to require plenary consideration.

The first case cited by the Attorney General under this heading, *Minnesota v. Clover Leaf Creamery Co.*, ____ U.S. ____, 101 S.Ct. 715 (1981), (motion, p. 10) is seriously misinterpreted by the Attorney General. He states in his brief that the case stands for the proposition that if a state law "visits its effects equally upon both interstate and local business it cannot be challenged as being violative of Commerce Clause." This Court made no such statement. Rather, in fact, it stated just the opposite. Following is the pertinent portion of this Court's opinion:

> Even if a statute regulates 'even-handedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'

Other cases cited by the Attorney General regarding the Commerce Clause issue fully support the position of appellants because this Court, after carefully weighing the

local interests against the impact on interstate commerce found that the state law *was* an undue burden on interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980); *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), (motion, pgs 10, 11, 13).

The Attorney General further contends that because Congress has not yet entirely preempted all state usury laws, that Congress has blessed the state laws that remain. Appellants do not believe this Court will seriously consider the suggestion that Congress intended by not preempting all state usury laws to have made a determination that any particular state usury law remaining was or was not a rational regulation of interest rates. As pointed out in appellants' jurisdictional statement, pages 22 - 26, there are broad areas where Congress has always left to the states the power to enact *reasonable* laws even though those laws affect interstate commerce. However, where a law is challenged as being an *unreasonable* regulation affecting interstate commerce, Congress has properly deferred to the courts as the proper branch of government to review on a case by case basis the rationality of the law. As Chief Justice Stone made clear in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945):

> But in general *Congress has left it to the courts* to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. . . . (Emphasis added) (325 U.S. 761 at 770)

The Attorney General's citation of the case of *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975) (motion, page 12) is inapplicable for the same reasons given previously for the

reliance on the *Spiegel* cases. *Alden*, like *Spiegel*, challenged *broadside* the right of a state to enact any usury law. The rate was not in question.

Therefore, there is a substantial question that the Arkansas usury law not only is a burden on interstate commerce but completely prohibits the flow of money in interstate commerce in times such as have existed during the past few years. Since there are innumerable rational alternatives for regulating interest rates, the Arkansas usury law cannot pass the required test under the Commerce Clause.

D. THE ARKANSAS USURY LAW DENIES APPELLANTS EQUAL PROTECTION OF THE LAW UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his motion to dismiss, the Attorney General totally ignores the principal case relied upon by appellants in their jurisdictional statement which established beyond any doubt that a law, although applying equally to all on its face, is an unconstitutional denial of equal protection if it *operates* unequally. This principle was reaffirmed by this Court in *Williams v. Illinois*, 399 U.S. 235 (1970) cited at page 27 of appellants' jurisdictional statement. No further citation is needed to establish this point.

The fact that the law does operate unequally on citizens of Arkansas and citizens of other states desiring to borrow or lend in Arkansas is not denied by the Attorney General. Thus the position of appellants that the Arkansas usury law denies them equal protection of the law is also not overcome by the Attorney General's motion.

E.

CONCLUSION

In their jurisdictional statement, appellants demonstrated beyond any doubt the severe economic impact of the irrational Arkansas usury law upon Arkansas citizens and those attempting to do business with Arkansas citizens. The jurisdictional statemen also demonstrated beyond any doubt the substantial nature of the questions presented. The motion to dismiss filed by the Attorney General actually emphasizes the accuracy of appellants original position. This case should, therefore, be scheduled for plenary consideration.

Respectfully submitted,

HERSCHEL H. FRIDAY, JR.
FRIDAY, ELDREDGE & CLARK
Twentieth Floor
First National Building
Little Rock, Arkansas 72201
(501) 376-2011

Counsel of Record of Appellants

Darrell D. Dover
HOUSE, HOLMES & JEWELL
1550 Tower Building
Little Rock, Arkansas
Attorneys for Commercial
National Bank

C. J. Giroir, Jr. and
Hillary Rodham
ROSE, NASH, WILLIAMSON,
CARROLL CLAY & GIROIR, P.A.
720 West Third Street
Little Rock, Arkansas 72201
Attorneys for First Arkansas
Bankstock Corporation, Worthen
Bank & Trust Company, First
National Bank in Hot Springs,
The Stephens Security Bank of
Stephens, Arkansas, and
Arkansas Mortgage Bankers Assn.

Terry Matthews
WRIGHT, LINDSEY & JENNINGS
Worthen Bank Building
Little Rock, Arkansas 72201
Attorneys for Fausett & Co.

James M. McHaney
OWENS, McHANEY & McHANEY
1902 First National Building
Little Rock, Arkansas 72201
Attorneys for Arkansas Bankers Association

John B. Plegge
PLEGGE & WEBER
1004 Pyramid Life Building
Little Rock, Arkansas 72201
Attorneys for Arkansas Automobile Dealers Association

Griffin Smith
1955 Union National Bank
Little Rock, Arkansas 72201
Attorney for Union National Bank of Little Rock

Robert D. Smith, III
SMITH & JERNIGAN
1000 Tower Building
Little Rock, Arkansas 72201
Attorneys for Arkansas Savings & Loan League and Arkansas Financial Services, Inc.

W. J. Walker
601 Rock Street
Little Rock, Arkansas 72203
Attorney for Arkansas Credit Union League

Larry C. Wallace
WALLACE, HILBURN, CLAYTON, MAY & CALHOUN
Twin City Bank Building
North Little Rock, Arkansas
Attorneys for Arkansas Financial Services, Inc.

Stephen A. White
Post Office Box 85
Charleston, Arkansas 72933
Attorney for American State Bank